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Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Color

Robert A. Williams, Jr.*

Whoever wants to learn a science has to learn to master its
methodology.

Hans-Georg Gadamer¹

Introduction

I want to relate a parable. This parable will serve as a preamble to my basic theme, which is the perils and promise of critical legal theory for peoples of color. This theme will be elaborated by specifically focusing upon the Critical Legal Studies movement in the United States, and the relevance or irrelevance, the benefits or dangers, this movement holds for minority legal scholars and theorists.

I tell this parable in an indigenous American context, although I have read or heard the parable's basic scenario frequently applied to other so-called "primitive" peoples of the Fourth World. In that sense, the parable may be regarded as part of the apocrypha of European-derived colonizing discourse.

My own intention, however, in placing the parable as the inaugural of a specifically intended non-Europeanized legal discursive practice is to illustrate the suppressed, self-deciphering potential of all European-derived apocryphal texts, fables, and myths respecting peoples of color. The etymology of the word apocrypha itself suggests the methodology of just such a practice: apocrypha—from the Greek *apokryphos*, meaning hidden or obscure; derived from *apo* ("away"), and *kryptein* ("to hide," which is also the root source of our word "crypt"). Thus, apocrypha indicates a hiding away or burying, from which springs our contemporary usage of the word to indicate writings or statements of spurious authenticity. (The etymological imbrications become even more intense when one considers that our word "spurious"

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1. Hans-Georg Gadamer, *Philosophical Hermeneutics* 11 (1976).

derives from the Latin, *spurius*, for bastard. It was Friedrich Nietzsche who realized, of course, that philosophy must serve as the root legitimating basis for any critical theory that would avoid the charge of spuriousness.)²

The deciphering of European-derived colonizing discourse requires a methodology capable of unearthing the techniques and multiple forms of subjugation concealed by the dominant culture's apocrypha respecting peoples of color. This unearthing is the penultimate goal of a non-Europeanized, minority scholarly practice. The ultimate goal of such a scholarship is to rediscover through this disinterring act our own discrete insurrectionist discourses suppressed by the tyranny of totalizing visions of knowledge and power.³ Whether critical legal theory can be of assistance to our projects represents a central inquiry pursued in this article. A related but less central inquiry pursued in this article is whether the Critical Legal Studies (CLS) movement, which has consistently generated texts displaying contempt, hostility, and suspicion of "rights" discourse—the most effective of the insurrectionist discourses utilized in the struggles of peoples of color—offers either spurious or authentic assistance to a minority scholarly practice.

The Parable of the Grandfather and the Elevator

An old Indian Grandfather, who was also a traditional medicine man of his tribe in the southwestern part of the United States, left Indian Country for the first time to visit his tribe's lawyers in Phoenix. The lawyers were handling a land claim for the tribe. Like many Indian Nations, the Grandfather's tribe was deeply split and factionalized along the usual assimilationist-traditionalist lines.⁴ The assimilated—those who had been educated in the schools provided by the colonial government and who viewed progress in material, Anglo-derived terms—controlled the tribal government. The assimilateds were unanimously in favor of pursuing monetary damages for this huge tribal land claim dating back many years. They had been convinced by the lawyers, all non-Indians, that Congress was not likely to authorize the return of the lands which were now prosperous ranches owned by

2. See Friedrich Nietzsche, *The Genealogy of Morals* §§ 162-63 (F. Golfing trans. 1956).

3. See generally Michel Foucault, *Two Lectures*, in *Power/Knowledge: Selected Interviews and Other Writings 1972-77*, at 78-108 (Colin Gordon ed. 1980) (discussing the powers associated with the institutional functioning of scientific discourse in our society).

4. See Vine Deloria, Jr. & Clifford M. Lytle, *The Nations Within: The Past and Future of American Indian Sovereignty* 215-64 (1984).

wealthy white cattle ranchers. The assimilateds believed that the tribe should therefore pursue monetary compensation in the white man's courts. The lawyers told the tribe there was only a small chance of winning the litigation and, if they lost, the tribe would probably be precluded from pursuing any claims in other forums. Despite the risks, however, the lawyers were willing to litigate the tribal claim for the normal ten percent of any monetary award dictated by the usual federal statutes.⁵ The potential payoff for a victorious claim, in the tens of millions of dollars, made the risk worth a law firm's while.

The traditionalists, the grandmothers and grandfathers whose own world view led them to regard Anglicized political and legal processes as un-Indian, and therefore to be avoided, and who exercised a dangerously regarded influence on the youths of the tribe, had not participated in the tribal government's decision to hire the lawyers and pursue the money claim. When word of the decision reached them, however (which took a while as most lived far from the main town on the reservation, which they called "Red Tape Junction"), they were very upset. They decided to make a special trip to the next tribal council meeting, and they named the old Grandfather-medicine man as their spokesman.

The presence of so many traditionals, most of whom were elders and therefore very respected by all the people (even the tribal government officeholders), alarmed the assimilateds in the tribal

5. See generally Vine Deloria, Jr. & Clifford M. Lytle, *American Indians, American Justice* 142-43 (1983). For example, under legislation establishing the Indian Claims Commission, attorneys representing tribes with claims against the United States were entitled to up to 10% of the amount recovered in any case. These claims frequently brought awards to the tribes in the millions of dollars. See *id.*

REPRESENTATION BY ATTORNEYS

Sec. 15. Each such tribe, band, or other identifiable group of Indians may retain to represent its interests in the presentation of claims before the Commission an attorney or attorneys at law, of its own selection, whose practice before the Commission shall be regulated by its adopted procedure. The fees of such attorney or attorneys for all services rendered in prosecuting the claim in question, whether before the Commission or otherwise, shall, unless the amount of such fees is stipulated in the approved contract between the attorney or attorneys and the claimant, be fixed by the Commission at such amount as the Commission, in accordance with standards obtaining for prosecuting similar contingent claims in courts of law, finds to be adequate compensation for services rendered and results obtained, considering the contingent nature of the case, plus all reasonable expenses incurred in the prosecution of the claim; but the amount so fixed by the Commission, exclusive of reimbursements for actual expenses, shall not exceed 10 per centum of the amount recovered in any case.

Act of Aug. 13, 1946, ch. 959, 60 Stat. 1049, 1053 (codified at 25 U.S.C. § 70n (1976)) (repealed Sept. 30, 1978).

council. The traditional elders had never taken much of an interest in politics; in fact, most had never even voted in tribal elections, much less white men's elections. Everyone knew that something big was going to happen. They let the Grandfather speak, and he addressed the concerns of his group. "If the land was taken as you and your lawyers say, then why not get it back? The land is sacred. Money cannot buy land. Money is what the white man uses to buy the Indian; money is what gets the Indian to give up the only thing of value that the white man ever wants in return from us, our land."⁶

All the other traditional elders, as well as many of the younger members of the tribe, nodded their heads in agreement. The Council chairman, who was basically a good man but a far better politician, did not desire to cause a greater division in the tribe

6. The use of the term "white man" by the Grandfather may require some explanation. At least with respect to this one instance, consciousness raising might excuse the masculine bias infecting the Grandfather's discourse. Peoples of color in the United States frequently refer to the "white man" or simply "the man" in generic discussions on the oppressive reality of racial hierarchy in this country. Thus, the male gender references used by the Grandfather throughout the parable represent my own reductionist concerns for capturing the discursive experience of peoples of color. I have never personally heard an Indian person refer to the "white woman" as a generic term for conveying the reality of racial polarization in the United States. From an Indian perspective, in fact, this masculine bias in referring to whites is entirely consistent with our own call to consciousness whenever we discuss the history of white colonization of America. When one examines that history, one inevitably finds that it is a history of the thought, actions, and discourse of European men. There are exceptions, such as Isabella's sanctions of Columbus upon learning of his enslavement of Indians on the island of Hispaniola. See Robert Williams, *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 S. Cal. L. Rev. 1, 37 (1983). The small number of exceptions, however, serves to emphasize that the conquest of Indians and the development of legal rules to regulate their colonization has been primarily an enterprise of European-descended males. Carol Gilligan's book, *In A Different Voice* (1982), offers provocative insights into male psychology that may at least partially explain this historical phenomenon. Gilligan identifies a mystical respect for the rules of the game, combined with a socialization process stressing competitive and aggressive behavior, as key components in the male's early psychological development in European-derived cultures. On the other hand, the early psychological development of women is characterized by "an ethic of care [which] rests on the premise of non-violence" in these societies. *Id.* at 174. There are numerous other points of illumination in contemporary feminist scholarship which link its project with that of an Americanized scholarship of European colonization of the Indian. There is, in fact, a tremendous potential that these two different voices can generate a multifaceted critical discourse on the dominant European-male derived vision in contemporary theoretical fields. Finally, it is important to note that Indian people can boast of a proud and varied history of women assuming important leadership and peacemaking roles in the tribe. See generally Carolyn Forman, *Indian Women Chiefs* (1954) (describing numerous tribes in which women asserted substantial leadership roles). A recent and excellent comprehensive bibliography on American Indian women is provided in Gretchen Bataille & Kathleen Sands, *American Indian Women: Telling Their Lives* 155-206 (1984).

than already existed. He particularly did not wish to see a normally quiescent faction of the tribe mobilized. He first attempted to describe the "realities" of the situation, but quickly became frustrated in attempting to explain in simple terms the complexities of the white man's laws and politics.

"Look," he said, "why don't we send you as representative of your own people down to Phoenix to talk with the lawyers, and they can explain it to you. Then you can ask them these same questions which I am not able to answer. If you are not then satisfied, you can come back here and let us know. Then we will talk further and perhaps pursue a different path." At that point someone in the audience shouted, "Yes, like hiring different lawyers." At that, everyone laughed. After the laughter died down, the old medicine man looked around him and saw that his people all seemed to think that the chairman's suggestion was a good idea and made in good faith. "Besides," one of them whispered behind him, "you've never seen Phoenix before."

The Grandfather nodded. While he'd never been to Phoenix before, had never even left the borders of his Nation, he had talked to lawyers, years ago. He was quite familiar with their ways, particularly with how they used and twisted words as a pretense of their "open minds." He'd come to the conclusion long ago that the only thing lawyers really kept open was their hands to grab more money from Indian people, and that once they'd made up their mind, nothing could really be done about it. But his people seemed to think it was a good idea to go to the white man's big city, to walk through the "canyons of steel" as he'd heard it once described. He would go to Phoenix to hear what these lawyers had to say, to see if it was possible to get the land back, instead of just trading in the land for something ultimately worthless to his people, like money. If he was not satisfied with their double-talk, he would return and suggest that the tribe hire other lawyers who would act in the tribe's best interest rather than in their own.

The Grandfather was put on the bus to Phoenix. At the bus station, he was met by two young associates from the law firm who were to escort him down to the firm's prestigious offices. The Grandfather was amused that the law firm was so afraid of an old Indian medicine man that it had sent a beefed-up regiment; two one-hundred-dollar-an-hour white men to make sure nothing went wrong.

As they entered the lobby of the firm's office building, the young associates started shuffling to the elevator, but suddenly the medicine man froze in his tracks. "I hope," he said urgently, "that

you do not intend for me to walk through those doors." One of the associates winked at the other, and answered reassuringly, "Why of course. It's only an elevator." The Grandfather then said, "I do not know what you call it. I only know that a minute ago those doors opened and a man walked in. Then these doors closed, and next thing I know, the doors opened again, and a woman walked out. That's bad medicine where I come from." After a few moments of explanation, the associates thought they had the situation under control, and the Grandfather agreed to use the elevator. When they reached the offices, all the other lawyers laughed along with the Grandfather when the story was told.

Selected Readings

In discussing the perils and promise of critical legal theory for peoples of color, it is important to keep the parable of the Grandfather and the Elevator in mind. As part of the apocrypha of European colonizing discourse, the parable would seem to indicate a reading embedded in a familiar homological structure. The "primitive" encounters the "modern." In his simplicity and assumed backwardness, the primitive mistakenly translates a highly familiar, pedestrian occurrence in the modern world as something magical: a metamorphosis. The competing visions contained by the parable—primitive-modern, magic-technics—illuminate essential differences in world view between the two cultures. With respect to those differences, we are led inevitably to certain acts of privileging one world view over the other. What seems magical to the primitive can be readily explained by the modern man's science. The old man, though respected as wise in his own world, is disoriented, lost like a child in the "real" world of the white man. Even the young associates "know" more than him. Though novel, the primitive's world view is demonstrated as being patently wrong, an anachronism, something that should be *abandoned* once the last of the Grandfather's generation has passed away. While the lawyers laugh with the Grandfather, they also laugh at him.

One might be disposed to dig deeper into the parable's "meaning," to gloss over the old man's seeming ignorance of the rudimentary knowledge of "civilized" life. One might rage at a world, a society, which could so poorly equip this noble old man to fight his upcoming battle of wits with the lawyers.

We are left with two alternative readings of the parable, two interpretations of its meaning for us. Our first reading judges the Grandfather's primitive world view by the demysticized reality of our "modern" vision of the world. The comedy of the parable lies

precisely in the Grandfather's failure to assimilate the data of the modern's reality to his own primitive vision. The "meaning" of the parable contained in this first reading is this failure of the primitive to assimilate to modernity.

Our second reading of the parable judges modernity itself by the Grandfather's failure. It views the Grandfather's inability to assimilate the idea of the modern's vision to his own primitive reality as tragedy. The "meaning" of the parable contained in this second reading is the indictment of modernity for its failure to facilitate the primitive's adaptation to relentless necessity.

The difference between these two Eurocentred readings is not as great as one might suppose. It is the difference between either a discourse of superiority and a discourse of paternalism (which is only that of superiority with good intentions). To illustrate, it is the difference between apocrypha like *The Gods Must Be Crazy*, a movie which the South African ambassador to Canada cites in support of *apartheid*,⁷ and apocrypha like *The Emerald Forest*, a movie which incites white liberals to manufacture their sympathy for vanishing indigenous peoples and their novel vision of life.⁸ Both movies are parasites upon the corpus of texts, myths, and fables of European-derived colonizing discourse respecting peoples of color.

Both these Eurocentrically-related readings of the parable imply that defeat waits for the Grandfather at the end of his elevator ride. The medicine man will himself be mystified by the lawyers, who will then demystify their legal science for the primitive's enlightenment and win him over to their view of things. These two readings will be utilized to signify the perils of critical legal theory for peoples of color. Within the context of these related readings of the parable, the medicine man will lose faith in his vi-

7. Interview on "Sunday Morning" (Canadian Broadcasting Corporation, Oct. 6, 1985). *The Gods Must Be Crazy* (Twentieth Century Fox 1984) recounts the trials and tribulations of an African bushman who takes on the task of ridding his tribe of a chance-upon soda bottle. The bottle's utility and uniqueness had made it an object of desire amongst the tribespeople, and thus had introduced unassimilable concepts of private property within the community. The bushman goes upon a journey to throw the troubling object off the edge of the world, and during the course of his journey, meets various white Africans. The remainder of the comedy explores the unbridgeable contrasts between the bushman's world view and that of "civilized" white Africans.

8. In *The Emerald Forest* (Embassy 1985), the son of a white engineer engaged in taming the Amazon wilderness is kidnapped by Indians. The white boy "becomes" an Indian, a fact which the father finds difficult to accept after finally tracking his son down after many years. The movie's principal theme is the radical difference between the Indian world view, tragically caricatured as magical yet anachronistic and doomed to disappear, and the civilized white world view, caricatured as inevitably triumphant yet deficient.

sion of the world; he may even feel like a fool now that the white man's science has been explained to him. He may abandon his faith in his own magic for another's magic. He will use the elevator, but know he is many steps behind his white brother.

It is possible to unearth a divergent interpretation of the parable in which the homology of its structure dissipates in a more radical confrontation with its text. The first two readings indicate the power of European-derived colonial and cultural-imperialist discursive practice.⁹ Note that both readings relied upon a shift in focus at the critical moment of the parable's denouement. Until the moment when the Grandfather stopped at the elevator, we understood the parable's world as the Grandfather's world; we assumed we spoke his language. Yet at the moment of the Grandfather's *faux pas*, did you not, as reader, immediately focus beyond what the Grandfather saw, confident in your own knowledge of the "truth" of the elevator, assuming the same position of superiority as the two young associates? In a sense, did you not *abandon* the old man once his world view proved divergent and, in light of your own interpretation—spurious. Did you not laugh also? Such is the power of the European's episteme that its denial

9. See, e.g., the discussion in Foucault, *supra* note 3, at 85-86:

By comparison, then, and in contrast to the various projects which aim to inscribe knowledges in the hierarchical order of power associated with science, a genealogy should be seen as a kind of attempt to emancipate historical knowledges from subjection, to render them, that is, capable of opposition and of struggle against the coercion of a theoretical, unitary, formal and scientific discourse. It is based on a re-activation of local knowledges—of minor knowledges . . . in opposition to the scientific hierarchisation of knowledges and the effects intrinsic to their power: this, then, is the project of these disordered and fragmentary genealogies. . . .

Is the relation of forces today still such as to allow these disintegrated knowledges some kind of autonomous life? Can they be isolated by these means from every subjugating relationship? What force do they have taken in themselves? And, after all, is it not perhaps the case that these fragments of genealogies are no sooner brought to light, that the particular elements of the knowledge that one seeks to disinter are no sooner accredited and put into circulation, than they run the risk of re-codification, recolonization? In fact, those unitary discourses, which first disqualified and then ignored them when they made their appearance, are, it seems, quite ready now to annex them, to take them back within the fold of their own discourse and to invest them with everything this implies in terms of their effects of knowledge and power. And if we want to protect these only lately liberated fragments are we not in danger of ourselves constructing, with our own hands, that unitary discourse to which we are invited, perhaps to lure us into a trap, by those who say to us: 'All this is fine, but where are you heading? What kind of unity are you after?' The temptation, up to a certain point, is to reply: 'Well, we just go on, in a cumulative fashion; after all, the moment at which we risk colonisation has not yet arrived'. One could even attempt to throw out a challenge: 'Just try to colonize us then!'

of heterodoxy dictates a discursive practice of abandonment and marginalization; spatial strategies which, like our discourses upon death ("He has passed away," "She has gone on ahead of us," etc.), obscure and deny the inexorableness of our own temporality.

Would you feel as confident in your interpretation, however, if you knew that "playing Indian" was a traditional strategy employed by indigenous Americans in dealing with non-Indians, particularly in situations of unequal bargaining power. In Indian discourse, "playing Indian" (also referred to as the "noble savage game"), means to play upon the white man's own prejudices and sense of superiority in order to assure that he underestimates your abilities. The strategy has been acquired and perfected over years of learning to deal with a stronger adversary possessing no compunctions about the morality of dissembling or refusing to deal "in perfect good faith."¹⁰ The most renowned victim of this strategy died with his boots on in a nineteenth century South Dakota military skirmish intended to enforce the United States's abrogation of an Indian treaty.¹¹

From this non-Eurocentred angle of vision, a highly tenable reading previously buried within this apocryphal parable is revealed. The Grandfather is respected and trusted among his people. Although the Grandfather has never left Indian Country, he likely knows enough about the world and the white man's technological capacity to neither overestimate nor underestimate its achievements. He had heard about the "canyons of steel" in the white man's city. Is it that unlikely that he's had an elevator described to him in answer to the quite reasonable question as to how one reached the top of such tall buildings creating these canyons? For that matter, there may even be an elevator on the reservation itself, perhaps in the Indian Health Clinic or tribal government office building. Perhaps, you too, dear reader, so unfamiliar with the ways by which Indian people live and survive in a society such as ours, underestimated the Grandfather.

From this non-Eurocentered perspective, the parable tells the tale of an old man seeking to gain any advantage possible in the game of wits where he recognizes his own weaker position. The lawyers, after all, want a chance at their ten percent legal fee.¹²

10. See, e.g., *United States v. Sioux Nation*, 448 U.S. 371 (1980).

11. See *id.* at 367-80 (describing General George Armstrong Custer's role in the events leading to the breach of the 1868 Fort Laramie Treaty with the Sioux Nation. Custer died at the Battle of the Little Big Horn, June 25, 1876, in the midst of a campaign to round up "hostile" Sioux exercising their hunting rights under the Fort Laramie Treaty).

12. See Deloria & Lytle, *supra* note 5, at 142-43.

The old man's diversionary tactic at the elevator presents a potential obstacle, though not a serious one in the lawyers' minds, as they do not recognize it as a diversion to their winning this game. If they can convince the Grandfather of the "impossibility" of getting the land back, then they can pursue their strategy unhindered. In this game of playing Indian, the Grandfather seeks to play upon his opponents' own prejudices, to let them think "they had the situation under control." He is, in effect, engaged in discursive guerrilla warfare, a deadly game of dissimulation, in which only the Grandfather knows that both sides are dissembling. He thus seeks to gain an advantage when the lawyers fail to choose their words as carefully as they might for a more "worthy" adversary. He will strike at that moment when their own sense of superiority leads them to carelessly lower their guard left undefended by their double-talk, inflict whatever damage he can, seek concessions, and, if lucky, win their withdrawal. His ultimate goal is decolonization.¹³

We have seen such guerrilla tactics deployed successfully against the white man before: Vietnam; the Marine barracks in Lebanon; even the Little Big Horn. All these historical events are the negative by-products of a discourse of knowledge and power seeking to sustain itself by its own cultural hubris. Terrorism becomes a necessity only when a dominant discourse seeks to marginalize or extinguish those radically divergent discursive practices it has colonized. Terrorism becomes a possibility, however, only when a dominant discourse then underestimates the vestigial knowledge and power of those oppositional practices not yet fully suppressed.

Our divergent interpretation of the parable of the Grandfather and the Elevator will be utilized to signify the promise of critical legal theory for peoples of color. Within the context of this reading of the parable, the medicine man slyly deploys a strategy which seeks to turn the white man's own discourse against him, in order to reveal what lies buried beneath his adversary's discursive practices. The Grandfather relies on his faith in his own "magic," the historical knowledge of the struggles of his people, and the hard-learned lessons it teaches. He fights to preserve the integrity of his own world view against the tyranny of illegitimate globalizing discourses.¹⁴ He patiently improves his trusted weapons, traps,

13. See generally Edward Said, *The Text, The World, The Critic*, in *Textual Strategies: Perspectives in Post-Structuralist Criticism* 161-88 (Josue Harari ed. 1979) (illustrates deconstructionist theories as applied to literary criticism).

14. See Foucault, *supra* note 3, at 80-81.

and snares which he continually deploys to overcome the white man's temporary advantage in discursive guerrilla warfare. He will use the elevator, but will not let on that he is one step ahead of his white brother. He will strive to laugh last.

Of Parabology

The parable has in one sense introduced the basic theme of my text, but in another, more profound sense, has concluded it as well. In its paricidal acts of anticipation and reconstitution,¹⁵ the parable cannot stand as other than the perils and promise of critical legal theory for peoples of color, though we may expect less of it. In this sense, what follows the preamble is a digression, "a re-examination of the familiar."¹⁶ Admitting that this is my intent only problematizes the normal assumption of the text as provisional origin of the preamble, an assumption based on certain problematic Western conceptions of space and time. But one must leave sight of familiar shores in order to discover new worlds, and even then one may not possess the lexicon to define what has been found. What else could that lost Genoan sailor name the inhabitants of America, other than "Indians." To think what lies buried beneath the apocryphal story of the "discovery" of America. The European credited with "discovering" America was so utterly lost that after three separate voyages, he died still believing he had found a new route to Japan.¹⁷

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15. The preface, by daring to repeat the book and reconstitute it in another register, merely enacts what is already the case: the book's repetitions are always other than the book. There is, in fact, no "book" other than these ever-different repetitions: the "book" in other words, is always already a "text," constituted by the play of identity and difference. A written preface provisionally localizes the place where, between reading and reading, book and book, the inter-inscribing of "reader(s)," "writer(s)," and language is forever at work.

Gayatri Chakravorty Spivak, *Translator's Preface*, in Jacques Derrida, *Of Grammatology* at xii (1976).

16. *Id.* at xiii.

17. Robert Berkhofer, *The White Man's Indian: Images of the American Indian from Columbus to the Present* 4-6 (1978) (discussing Columbus's mistaken belief that he had discovered islands among the East Indies and thereby denominated the Arawak tribespeople he "discovered" in the Bahamas "*los Indios*." The Arawaks were given their revenge, however, by sixteenth century European geographers, who honored the Genoan's "discovery" by the name of another). As for Columbus's geographical state of mind respecting exactly what he discovered, most geographical and naval historians who have studied the issue closely have concluded that Columbus died firmly holding "the conviction that he had reached Asia." George E. Nunn, *The Geographical Conceptions of Columbus: A Critical Consideration of Four Problems* 55-56 (1924).

An earlier group of historians, perhaps inspired in 1892 by the 400th anniversary of Columbus's first voyage, sought to revise the commonly held thesis that Columbus died unaware that he "had discovered a new world distinct from the India

What Is Critical Legal Theory?¹⁸

What is critical legal theory, and how might it assist a project

and Cathay which had been the original object of his search." *Id.* at 56. See, e.g., Henry Harrisse, *The Discovery of North America: A Critical, Documentary, and Historic Investigation* (1892); J.B. Thacker, *Christopher Columbus: His Life, His Work, His Remains, As Revealed by Original Printed and Manuscript Records* 568, 612 (1904). Nunn's book, *supra*, adequately refutes these efforts at Columbus-revisionism. Samuel Eliot Morison, the leading contemporary United States scholar on Columbus, wrote:

[I]t is one of the ironies of history that the Admiral himself died ignorant of what he had really accomplished, still insisting that he had discovered a large number of islands, a province of China, and an "Other World"; but of the vast extent of that "Other World," and of the ocean that lay between it and Asia, he had neither knowledge or suspicion.

Samuel Eliot Morison, *The European Discovery of America: The Southern Voyages* 266 (1974).

As we approach the 500th anniversary of Columbus's "discovery," those tempted toward revisionism ought to recognize that the great Admiral was the first, and one of the greatest, enslavers of the indigenous peoples he named "Indians" in the history of the New World. Williams, *supra* note 6, at 37.

18. Professor Duncan Kennedy has defined critical legal studies as "the emergence of a new left intelligensia committed at once to theory and to practice, and creating a radical left world view in an area where once there were only variations on the theme of legitimization of the status quo." Duncan Kennedy, *Critical Labour Theory: A Comment*, 4 *Indus. Rel. L.J.* 503, 506 (1981). Professor Alan Hunt, in one of the most thoughtful and penetrating critiques of the Critical Legal Studies movement, has described it as "the first movement in legal theory and legal scholarship in the United States to have espoused a committed left political stance and perspective." Alan Hunt, *The Theory of Critical Legal Studies*, 6 *Oxford J. Legal Stud.* 1 (1986). Roberto Unger, in by far the most widely-cited manifesto of the Critical Legal Studies movement, has stated: "The critical legal studies movement has undermined the central ideas of modern legal thought and put another conception of law in their place. This conception implies a view of society and informs a practice of politics." Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 *Harv. L. Rev.* 563, 563 (1983). Unger goes on in a footnote to describe the two schools of critical legal scholarship as follows:

Two main tendencies can be distinguished in the critical legal studies movement. One tendency sees past or contemporary doctrine as the expression of a particular vision of society while emphasizing the contradictory and manipulable character of doctrinal argument. Its immediate antecedents lie in anti-formalist legal theories and structuralist approaches to cultural history. . . . Another tendency grows out of the social theories of Marx and Weber and the mode of social and historical analysis that combines functionalist methods with radical aims. Its point of departure has been the thesis that law and legal doctrine reflect, confirm, and reshape the social divisions and hierarchies inherent in a type or stage of social organization such as "capitalism." But this thesis has been increasingly modified by the awareness that institutional types or stages lack the cohesive and foreordained character that received leftist theory attributes to them. . . .

Both tendencies criticize the dominant style of legal theories that try to refine and preserve this style. Both repudiate in the course of this critique the attempt to impute current social arrangements to the requirements of industrial society, human nature, or moral order. Both have yet to take a clear position on the method, the content, and even the possibility of prescriptive and programmatic thought, perhaps

seeking to decode the apocryphal texts, fables, and myths of European-derived colonial and cultural-imperialist discourse respecting peoples of color?

Critical legal theory can trace its influence to two separate intellectual movements of the early and middle decades of this century; critical social theory, a peculiarly European phenomenon, and Legal Realism, a phenomenon peculiar to the United States. Primary figures of critical social theory include Theodor Adorno, Louis Althusser, Antonio Gramsci, Max Horkheimer, Georg Lukacs, and Herbert Marcuse. One could widen the circle of influence by including such diverse theorists as Claude Levi-Strauss, Jean Piaget, and Max Weber, and also by acknowledging the contributions of a later generation pruning essentially the same vineyard: Jacques Derrida, Michel Foucault, Hans-Georg Gadamer, Jurgen Habermas, Jacques Lacan, E.P. Thompson, and Raymond Williams. While I've ignored certain, overly technical, generic distinctions, and certainly omitted at least one of several "major" figures from someone's list of favorite, mostly dead, famous Europeans,¹⁹ a certain distinguishing feature marks the work of the entire group. It would be impossible to imagine a corpus of work broadly defined as critical social theory without the substantive foundations provided by Karl Marx and Friedrich Nietzsche, and in a less direct way, Sigmund Freud.

The second major intellectual current that has shaped critical legal theory is American Legal Realism, a movement which flourished in several eastern law schools in the 1920s and 1930s.²⁰ A list

because some of the assumptions inherited from the radical tradition make it hard to turn constructive proposals into more than statements of commitment or anticipations of history.

The significance of the contrast between these tendencies should not be overstated. The actual works often differ less than the abstract interpretations placed upon them. And, many writings do not fall into either of the two groups mentioned.

Id. at 563-64 n.1.

19. Rendering any such list is fraught with danger. I've listed individuals with the purpose in mind of giving an indication of the broad spectrum of materialist and sociological thought informing "critical social theory." Perry Anderson's works, particularly *Considerations on Western Marxism* (1976) and *In the Tracks of Historical Materialism* (1983), provide good introductions to the dominant figures, styles, and works of the European critical school. Specific discussions on the impact of European critical and social theory on the Critical Legal Studies movement can be found in Allan C. Hutchinson & Patrick J. Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 Stan. L. Rev. 199, 213-30 (1984); David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 Stan. L. Rev. 575 (1984); Hunt, *supra* note 18, at 2-3.

20. See, e.g., Hutchinson & Monahan, *supra* note 19, at 204; Hunt, *supra* note 18, at 4-5.

of its major figures would include Karl Llewellyn, Felix Cohen, and Jerome Frank.²¹ What distinguishes the work of this group is its "essentially negative and iconoclastic"²² stance toward the legal process. For the most part, Legal Realism simply abandoned the effort to construct a theory of judicial decision making. Instead, its leading figures invested their energies and hopes in the New Deal and its "expert" administrative agencies to achieve the ideals of liberalism.²³ It was a tentative form of nihilism in response to modernism's corrosive impact upon all forms of twentieth century Western thought.

The inheritance of these two divergent intellectual currents in United States legal scholarship is critical legal theory, as elaborated today by the Critical Legal Studies movement (CLS), the principal heir.²⁴ A short list of its major figures would include Morton Horowitz, Duncan Kennedy, Tom Heller, David Trubek, Mark Tushnet, and Roberto Unger. It would be impossible to imagine critical legal theory as we know it today in all its renown without the foundations provided by the elite law schools housing these CLS progenitors.²⁵ For this reason, one cannot separate critical legal theory in the United States from the CLS movement. For better or worse, they have become synonymous.

There are a number of law review articles,²⁶ even law review symposium issues²⁷ and an entire book,²⁸ devoted to the subject of critical legal theory. Central to critical legal theory is the denial of the rational determinacy of legal reasoning. "Law," to the true "crit," (i.e., someone who identifies himself or herself as a fellow traveler in the Critical Legal Studies movement) "is simply politics

21. See generally Note, *'Round and 'Round the Brumby Bush: From Legal Realism to Critical Legal Scholarship*, 95 Harv. L. Rev. 1669, 1670-86 (1982) for a discussion of the historical development of Legal Realism.

22. Hutchinson & Monahan, *supra* note 19, at 204.

23. Hutchinson and Monahan point out that many of the Realists participated directly in various New Deal programs. *Id.*

24. See generally John Henry Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 Stan. L. Rev. 391 (1984); Robert Gordon, *New Developments in Legal Theory*, in *The Politics of Law: A Progressive Critique* 28 (David Kairys ed. 1982).

25. Horowitz, Kennedy, and Unger teach at Harvard University Law School; Heller at Stanford Law School; Trubek at the University of Wisconsin; and Tushnet at Georgetown University Law Center. Resumes for many of the founding members of CLS are provided in Schlegel, *supra* note 24, at 391-403. A bibliography of CLS works can be found in *Bibliography of Critical Legal Studies*, 94 Yale L.J. 461 (1984) [hereinafter *Bibliography*].

26. See, e.g., *Bibliography*, *supra* note 25.

27. See, e.g., *Reviews; Critical Legal Studies*, 47 Mod. L. Rev. 359 (1984) [hereinafter *Reviews*] and articles collected in the symposium issue of 36 Stan. L. Rev. 1 (1984).

28. See *The Politics of Law: A Progressive Critique* (David Kairys ed. 1982).

ressed in different garb; it neither operates in a historical vacuum nor does it exist independently of ideological struggles in society."²⁹ Put another way, what we regard as "legal doctrine" is actually a collection of dominant and dominating conceptions. These conceptions, "reifications" as the crits are wont to call them, are part of a larger discourse of power and knowledge serving to obscure the essential irrationality of our worldly existence.

Critical legal theorists' assault on formalistic legal reasoning is grounded in their denial of any distinction between law and politics. "Liberal rights theory," the notion that individuals possess "inherent" or fundamental rights, and, to a lesser-examined degree in crit legal literature, "entitlement theory," the legal intellectual foundation of the modern welfare state, particularly come under strenuous attack by crits.³⁰

Rights rhetoric in particular is vilified in numerous CLS texts as part of the reifying attempt in Western ideology to obscure unresolved contradictory values and dualities. These dualities—reason and desire; freedom and necessity; individualism and altruism; autonomy and community; subjectivity and objectivity—pervade our common law and statutory concepts of rights.³¹ Law is seen by the crits as an attempt to hide all the unresolved contradictions and conflicts presented by these dualistic value structures. Importantly, the contradictions of liberal rights theory enable courts to "move from one result to another without any consistent normative theory. Results are rationalized retrospectively."³² Liberalism's unresolved contradictions thus undermine the notion that its regime of legal rights can ultimately transform "the oppressive character of our social relations." In essence, CLS raises the possibility that the "rights" "won" under cases such as *Brown v. Board of Education*³³ or *Goldberg v. Kelly*³⁴ are only chimeras, partial

29. Hutchinson & Monahan, *supra* note 19, at 206. See also *Reviews*, *supra* note 27, at 359-61.

30. See, e.g., Ed Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 Stan. L. Rev. 509 (1984). Examples of critical scholarship focusing on rights discourse abound. See, e.g., Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 Yale L.J. 1063 (1981); Alan David Freeman, *Anti-Discrimination Law: A Critical Review*, in *The Politics of Law*, *supra* note 24, at 96; Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 Minn. L. Rev. 1049 (1978); Mark Tushnet, *An Essay on Rights*, 62 Texas L. Rev. 1363 (1984).

31. Sparer, *supra* note 30, at 516-17.

32. *Id.* at 517. The seminal crit treatment of "contradictions" is contained in Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685 (1976).

33. 347 U.S. 483 (1957).

makeshift concessions whose principal function is to preserve the intellectual as well as social stability of the dominant order.

Critical legal theory's focus upon the indeterminacy of the legal order derives primarily from European critical social theory. This body of thought has concerned itself with questions of hierarchy, hegemony, contradiction, and false consciousness since its proto-origins in the works of Marx and Nietzsche.³⁵ The trans-Atlantic filter for this type of "radical" thought was most likely the political science and sociology courses taught on elite college and university campuses in the 1960s. Most of the members of the Critical Legal Studies movement doubtlessly and thoughtlessly overexposed themselves to this socializing experience.

Critical legal theory's obsession with judge-made law as opposed to other forms of lawmaking, however, derives from its Legal Realist legacy. The scholarly inquisition of peripheral legal activity has long been a hallmark of legal academic mandarinism in the United States. Legal Realism's focus on the judiciary, while intended to pierce the veil of "transcendental nonsense,"³⁶ only

34. 397 U.S. 254 (1970).

35. See, e.g., Raymond Geuss, *The Idea of a Critical Social Theory: Habermas and the Frankfurt School* (1981); and the works of Perry Anderson, *supra* note 19.

36. See generally Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809 (1935). Cohen's famous article criticized "contemporary legal thought"—Cohen wrote during the 1930s—for its propensity to rely on the "absolute purity" of legal concepts inducing what he called "forgetfulness of terrestrial human affairs." *Id.* at 809. Criticizing "the traditional language of argument and opinion," *id.* at 812, Cohen offered the following critique of deciding important human questions on the basis of concepts he regarded as "transcendental nonsense":

Of course, it would be captious to criticize courts for delivering their opinions in the language of transcendental nonsense. Logicians sometimes talk as if the only function of language were to convey ideas. But anthropologists know better and assure us that "language is primarily a pre-rational function." Certain words and phrases are useful for the purpose of releasing pent-up emotions, or putting babies to sleep, or inducing certain emotions and attitudes in a political or a judicial audience. The law is not a science but a practical activity, and myths may impress the imagination and memory where more exact discourse would leave minds cold.

Valuable as is the language of transcendental nonsense for many practical legal purposes, it is entirely useless when we come to study, describe, predict, and criticize legal phenomena. And although judges and lawyers need not be legal scientists, it is of some practical importance that they should recognize that the traditional language of argument and opinion neither explains nor justifies court decisions. When the vivid fictions and metaphors of traditional jurisprudence are thought of as reasons for decisions, rather than poetical or mnemonic devices for formulating decisions reached on other grounds, then the author, as well as the reader, of the opinion or argument, is apt to forget the social forces which mold the law and the social ideals by which the law is to be judged. Thus it is that the most intelligent judges in America can deal with a concrete practical problem of procedural law

continued a long tradition in U.S. legal scholarship: the vision quest for some type of containing order in legal and social life achieved through judicial lawmaking. CLS's use of this tattered banner indicates the extent to which U.S. legal thought has obsessively concerned itself with questions essentially Freudian in nature.³⁷

The scholarly practice of critical legal theorists is informed by their focus on the indeterminant and contingent nature of the legal and social order. The crit's program seeks "to shatter the limiting conceptions of the possibilities of human association and of social transformation embodied in liberal legal thought . . . to complete the modern rebellion against the view that social ar-

and corporate responsibility without any appreciation of the economic, social, and ethical issues which it involves.

Id. at 812 (citations omitted). See also Karl N. Llewellyn, *A Realist Jurisprudence—The Next Step*, 30 Colum. L. Rev. 431 (1930).

37. Human life in common is only made possible when a majority comes together which is stronger than any separate individual and which remains united against all separate individuals. The power of this community is then set up as 'right' in opposition to the power of the individual, which is condemned as 'brute force'. The replacement of the power of the individual by the power of a community constitutes the decisive step of civilization. The essence of it lies in the fact that the members of the community restrict themselves in their possibilities of satisfaction, whereas the individual knew no such restrictions. The first requisite of civilization, therefore, is that of justice—that is, the assurance that a law once made will not be broken in favour of an individual. This implies nothing as to the ethical value of such a law. The further course of cultural development seems to tend towards making the law no longer an expression of the will of a small community—a caste or a stratum of the population or a racial group—which, in its turn, behaves like a violent individual towards other, and perhaps more numerous, collections of people. The final outcome should be a rule of law to which all—except those who are not capable of entering a community—have contributed by a sacrifice of their instincts, and which leaves no one—again with the same exception—at the mercy of brute force.

The liberty of the individual is no gift of civilization. It was greatest before there was any civilization, though then, it is true, it had for the most part no value, since the individual was scarcely in a position to defend it. The development of civilization imposes restrictions on it, and justice demands that no one shall escape those restrictions. . . . The urge for freedom, therefore, is directed against particular forms and demands of civilization or against civilization altogether. It does not seem as though any influence could induce a man to change his nature into a termite's. No doubt he will always defend his claim to individual liberty against the will of the group. A good part of the struggles of mankind centers around the single task of finding an expedient accommodation—one, that is, that will bring happiness—between this claim of the individual and the cultural claims of the group and one of the problems that touches the fate of humanity is whether such an accommodation can be reached by means of some particular form of civilization or whether this conflict is irreconcilable.

Sigmund Freud, *Civilization and Its Discontents* 42-43 (1962).

rangements are natural or inevitable.”³⁸

At its most ethereal level, critical legal theory seeks to identify and overturn all contingent, hierarchizing forms of legal consciousness in order to free up “the indefinite possibilities of human connection.”³⁹ This liberating process is to be achieved through diverse means, such as rotating capital funds and the disaggregation of consolidated property rights.⁴⁰

At a more pedestrian level, critical legal theory degenerates into irreverent half-seriousness and giddy late-night bullshit sessions in its attempts to cope with the awe-inspiring magnitude of such millennialist goals. Erecting and fostering environments (even in Wall Street law firms) of “unalienated relatedness,” “intersubjective zap,” and “small-scale microphenomenological evocation of real experiences in complex contextualized ways,”⁴¹ are urged as the transformatory goals on the path to the final solution.

Given the loftiness of critical legal theory’s goals, perhaps selecting a middle ground between these two paths of transcendence and slapstick—where critique’s pointed stiletto might cut through the veil of utter nonsense legitimating most forms of domination in our society—invites charges of intellectual lightweightedness. For the most part, those in the Critical Legal Studies movement, the principal expositors of critical legal theory in this country, have trammelled over this middle ground in their sweeping negative critiques of “liberalism, rights and rights theory.”⁴² Such iconic bugaboos serve as blockades on the crits’ freedom road to Utopia.

For peoples of color, however, these icons mark trails along sacred ground. The attack by the Critical Legal Studies movement on rights and entitlement theory discourse can be seen as a counter crusade to the hard campaigns and long marches of minority peoples in this country. Minority people committed themselves to these struggles, not to attain some hegemonically functioning reification leading to false consciousness, but a seat in the front of the bus, repatriation of treaty-guaranteed sacred lands, or a union card to carry into the grape vineyards.

The perils and promise of critical legal theory for peoples of color lie buried deep within this apocryphal discourse of CLS on the myth of rights. The relevance or irrelevance, the benefits or

38. Hutchinson & Monahan, *supra* note 19, at 216.

39. Unger, *supra* note 18, at 579.

40. *Id.* at 596.

41. See Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 Stan. L. Rev. 1-5 (1984).

42. Sparer, *supra* note 30, at 512.

dangers of this European-derived discursive practice for minority legal scholars thus can only be discovered in the twilight zone of this middle ground which has played such a central role in the battles of minority peoples. For beneath this ground lie buried our own martyrs, combatants for a terrain that people of color are now told may have been nothing more than the chimerical construct of a mystified consciousness. Perhaps only parables can help minority people cope with the despair that arises from the ironic implications of such an argument. The white man's greatest liberatory myth was perpetrated upon peoples of color solely to keep them in chains.

The Perils

The frequent attacks by CLS on both rights and entitlement discourse represent direct frontal assaults on the sole proven vehicle of the European-derived legal tradition capable of mobilizing peoples of color as well as their allies in the majority society. Recalling the parable of the Grandfather and the Elevator,⁴³ CLS's open assault on rights and entitlement theory represents the perils of critical legal theory for peoples of color. CLS's attack reflects Eurocentric readings of peoples of color's use of rights rhetoric. A discursive practice of abandonment dismissing minority peoples as irrelevant because of their anachronistic clinging to a false consciousness on rights can easily result from the acts of privileging and delegitimation which ground such Eurocentred readings.

CLS's attacks on rights discourse demonstrate the perils of a disengaged theoretical stance toward discourse unmediated by historical appreciation of the tradition from which a discursive practice is projected. The seizure of any form of discourse as an insurrectionist instrument of propaganda by a class or social group is determined in the final instance by its channelizing or constraining effects on the conduct of the opposed classes or social groups being addressed. Rights discourse, precisely because of its mystifying power in white America's legal and political mythology, secured significant ideological high ground for the legal and political movements of minority groups in the post-World War II era. CLS, with its overemphasis on theory's role in social movements, has simply ignored the tactical considerations which come into play in applying theory to practice. It is immaterial whether those seeking insurrection against the dominant order believe the "truth" of the seized-upon discursive practice. In fact, those com-

43. See *supra* text accompanying notes 4-6.

mitted to insurrection may well be motivated by the disparity between the "truth" of their own social and class situation, and the "truth" expressed by the dominant order's discourse. The ultimate insurrection, after all, is against the hypocrisy of those who prattle about high ideals and by their conduct do nothing to actualize those ideals in practice.

Granted, there may be intellectual merit in noting (a safe generation's distance from the *de jure* abolition of Jim Crow laws or abusive practices by welfare bureaucracies) that the moral high ground captured by excessive reliance on white society's discourse on rights may have been seized at the cost of "bolstering the idea that fairness was not far away"⁴⁴ in the United States. But one should not underestimate the ability of minority leaders to discount such costs in their strategic calculus of the gains to be made in securing this moral high ground. Failure to recognize that the dream had by a prophet such as Martin Luther King, Jr. was only that, a dream, and not an illusion, is a form of false consciousness engendered by a naive and unreflective historicism. Who, after all, would blaspheme the sacrifices of those who were lynched, shot, beaten, and jailed by speculating that in their hearts and minds they conceived the freedom road as being but a few short steps from completion. Were all the citadels of privilege maintained so violently by the majority society for centuries simply to be surrendered at once to those who had been so recently invested by a court or even a Congress with the mere banner of "rights"? The embarrassing absurdity of positing such a naive belief "that fairness was not far away" in the minds of those involved in the struggles for minority "rights" serves to highlight the instrumental function of rights rhetoric in the social movements of peoples of color. "Indeed, effective propaganda must always try to influence initially the judgment of the person addressed and to restrict [one's] possibilities of judgment."⁴⁵

Among the perils of CLS for peoples of color is its tendency to abandon and marginalize reliance upon what it regards as a false vision. But what nonmillennialist strategy capable of achieving at least partial mitigation of the immense denial of social, legal, and economic justice in this country does Critical Legal Studies offer in place of the allegedly false consciousness it attacks? It is far too easy for someone on a law professor's salary to offer open-ended reconstructive projects which may bring immense benefits to a future generation. Minority law professors, however, who en-

44. Mark Tushnet, *Book Review*, 78 Mich. L. Rev. 694, 709 (1980).

45. Gadamer, *supra* note 1, at 11.

joy the sinecurial comforts of an academic life, cannot afford the luxury enjoyed by our CLS colleagues of not speaking to the real and immediate needs of our respective peoples. The trust placed in us demands the highest fiduciary standards.

Recall the reading which interprets the Grandfather's hesitancy in entering the Elevator as the primitive's misunderstanding of the modern's science.⁴⁶ CLS offers a similar, seemingly easy ride to new heights of understanding for peoples of color. All that is required to reach the mountaintop is that we abandon what is perceived as our mystified consciousness respecting the magic of rights discourse. Many crits will even voice sympathy for our ignorance of "fancy theory," and offer to lead us to the new vistas available on the top floors of legal academia. They may even work for our appointments to their citadels of privilege.

But what of our people? Must they wait while we wallow in the despair of negative critique? Negative critiques, standing alone, lead us to abandon the only form of discourse which has effectively secured justice for our people during most of our lifetimes. And for what? Who knows, as half the fun of reaching the millennia for comfortably ensconced tenured academic-types is the long and enjoyable ride in getting there.

The reason why leftist and neo-leftist law professors feel little remorse or fear over the abandonment of rights discourse is that for them "rights" represent a concept, rather than a phenomenon. It is easy to "trash" a concept.⁴⁷ One cannot experience the pervasive, devastating reality of a "right," however, except in its absence. One must first be denied that seat on the bus, one must see the desecration of one's tribe's sacred lands, one must be without sanitary facilities in a farm field, to understand that a "right" can be more than a concept. A right can also be a real, tangible experience.

To relate this notion in terms which even the most inveterate CLSer can understand, consider the pleasure which you, as a radical yet ironically well-paid law professor derive from seeing your irreverent trashing of late nineteenth century consideration doctrine published in any one of what our profession regards as the twenty or so "top ten law journals."⁴⁸ (Charity prevents us from

46. See *supra* text accompanying notes 4-6.

47. On "trashing," see generally Mark G. Kelman, *Trashing*, 36 Stan. L. Rev. 293 (1984) (trashing means to take arguments seriously in their own terms, discover they are foolish, and look for some order in the chaos exposed).

48. When I was at Rutgers Law School, Camden, in the early 1980s, untenured faculty were told that the requirements for tenure were as objective as humanly possible. All one had to do was publish three articles of 100 pages and 400 footnotes

posing the obvious question: "What did you do today Johnny to advance the cause of the revolutionary vanguard of the proletariat?"⁴⁹)

Your "right" to speech (inscribed in your right to academic "freedom") not only entitles you to be irrelevant in an irreverent manner, but also to publish to the world by means of the obligatory asterisk at the bottom of page one of your article how well enmeshed you are in the network of canonical figures who grant *nihil obstats* to all CLS "pieces."⁵⁰ One of course can argue that I've either confused a right with a privilege, or the rewards garnered in a regime of meritocracy with those granted in a regime of rights. But this ignores my point of concern about the anterior functioning of rights in securing the tangible benefits attached to privileged social and economic status in any of the egalitarian societies of late European liberalism.

Like many of the rights taken lightly by CLSers, the right to speech is easy to denigrate when one has already reaped the returns of the enormous monetary investment in an education leading to a law professoriate. The right of "free" speech to express oneself in a prestigious law review, scholarly journal, or op-ed page of the New York Times was purchased at a cost far beyond the

in any of the "top ten law journals." When asked what the "top ten" law journals were, senior colleagues would inevitably recite a list which included at least 20 law reviews. The purpose of the "objective" requirement was to retain a degree of discretionary authority in assigning status ranking for law review articles which did not appear in the Harvard, Yale, Stanford, Chicago, Michigan, New York University, and Columbia Law Reviews, but in other "marginally good" law reviews so regarded by the senior faculty. On Rutgers-Camden, affectionately known as the "Beirut of American law schools" by its junior faculty, see Jay Feinman & Marc Feldman, *Pedagogy and Politics*, 73 Geo. L.J. 875, 925-30 (1985).

At the beginning of its recent period of expansion, in the early 1970s, Rutgers was like many other aspiring, middle-tier law schools. The path to prestige lay in faculty members publishing traditional, doctrine-oriented articles in prestigious law reviews. The dominant institutional ethics were faculty autonomy in the classroom, traditional intellectual standards in the production of scholarship, and conflict avoidance in institutional affairs.

Ten years later the Rutgers faculty was divided into warring camps that were commonly characterized as left and right, with few, if any, faculty members constituting a liberal center. The appropriateness of nontraditional teaching and critical scholarship were important issues for some, contemptible threats for others. Every issue of institutional policy was bitterly and closely contested.

Id. at 925.

49. Here I borrow from the English Marxist, Terry Eagleton: "[T]he question irresistibly raised for the Marxist reader . . . is simply this: How is a Marxist-structuralist analysis of a minor novel of Balzac to help shake the foundations of capitalism?" Quoted in Edward W. Said, *Opponents, Audiences, Constituencies, and Community*, Critical Inquiry, Sept. 1982, at 15.

50. See Hunt, *supra* note 18, at 2.

means of most peoples of color who are "educated" in ghetto, barrio, or reservation schools, or not at all (and after all, what's the difference).

One can say that expressing one's opinion is not really the exercise of a "right," but in actuality the concretization in practice of a reification representing nothing more than concessions to the marketplace. To a person who cannot afford to enter the marketplace, however, entry barriers are felt, not thought. Thus, the right to free travel will always remain a reified concept to anyone who can "freely" walk up to a counter and purchase an airline, train, or bus ticket, or better yet, hop in a BMW or well-maintained 1969 Volkswagen Beetle. For the person whose economic mobility remains trapped in the ghetto, barrio, or reservation, however, he or she feels no more free to break out of his or her status-defined life situation than the most abject prisoner exiled to a Soviet Gulag in Siberia.

My basic point is not that a "right" to free speech exists or does not exist. I am not concerned with metaphysics, but with the fact that politics is war carried on by other means, by discursive practices of power and knowledge which define and sustain their own truths.⁵¹ My concern is that we not surrender the few effective, albeit primitive, weapons in our possession to the enemy in fighting their truths, while we wait faithfully for the Cap Weinbergers of legal theory to deliver their promised new generation of tactical discursive weaponry sometime by the late 1990s.

It is not the fault of most of the members of the Critical Legal Studies movement that they have never been the victims of United States *apartheid* in their own lifetimes, that they have never heard the stories of the Grandmothers and the Grandfathers describing how bad things were before peoples of color started winning their "rights." What else could a right be other than an abstraction for someone who has never had their abstractions taken away or denied.

In far too many perilous ways, CLS underestimates peoples of color. To the underclass, the "concept" of rights has always possessed a highly instrumental character. Rights are something to get so that one is treated similarly to those in the overclass. Ask any ghetto, barrio, or reservation youth at a public defender intake why you are asking him whether the police advised him of his Miranda "rights." Do you seriously believe that his answer will be other than that you (the lawyer) are looking for a way to get him "off," to beat the "system?" Is he likely to answer, given any set of

51. See generally Foucault, *supra* note 3, at 90.

likely circumstances, that "Oh yea, you are concerned with vindicating my fundamental rights as a person under the Constitution of the United States"?

For such an individual, rights, whether economic, political, or legal, are seen as securing a tangible dignity in the most negative of senses. That is, I am treated relatively no worse in the economic, political, or legal realm than that other guy, who happens to differ from me only on the basis of racial or class characteristics. The same shoddy and parasitic police practices that allow my wealthy, cocaine-dealing white businessman brother to go free may also get me off the hook for my far less quantitatively serious crime against the social institution of property. But in that my businessman brother's wealth affords him the opportunity to purchase the legal skills necessary to realize such rights, while I may well go to jail because my public defender simply lacks the resources to wage an identical expensive defense, I thereby know I am still denied my rights. There is much work, therefore, which needs to be done with respect to these reifications which can land me in jail.

From this perspective arising from the historical experience of peoples of color in United States society "concepts" such as "rights" or "justice" assume a life of their own in an experiential sense. It is in this struggle for the tangible benefits of these "concepts" that peoples of color mobilize themselves to forge their own discourse. Unavoidably and irredeemably derivative in part of the majority society's discursive practices, this discourse is an expression of a will to insurrection which continuously challenges the authority of the dominant order. Most importantly, this type of discourse which finds its genesis in the historical struggles of peoples of color strategically employs those concepts, such as "rights," which speak most directly and forcefully to the prejudices of the dominant culture. Thus, discovering contradiction in the majority society's discourse on rights is the means, not the end, of the insurrectionist discursive practice of peoples of color: "In general, in a deep conflict, the eyes of the downtrodden are more acute about the reality of the present. For it is in their interest to perceive correctly in order to expose the hypocrisies of the rulers. They have less interest in ideological deflection."⁵²

Divorced from the essential historical situation of peoples of color, and unwilling or unable to mediate its distance from this rhetorical tradition in its reflective theoretical stance, CLS poses

52. Immanuel Wallerstein, *The Modern World System: Capitalist Agriculture and the Origins of the European World-Economy in the Sixteenth Century* 4 (1974).

the peril of dangerous irrelevancy for minority people. Its irresponsible speculations on the benefits and dangers of rights discourse divert attention from the unexplored and promising potential lying buried beneath the apocrypha of European-derived discourse on rights. CLS fails to recognize that peoples of color long ago recognized the spuriousness of a discourse which legitimated their oppression, but which itself contained unrevealed liberating myths which spoke with mystifying force and directness to their oppressors.

The Promise

What promise then, does critical legal theory hold for peoples of color? Particularly with respect to CLS, why should minority law professors have an interest in an elite scholarly movement comprised essentially of elite Anglo law professors nurtured in the bowels of elite Anglo law schools. Most American Indian, Black, and Latino people were highly critical of the white man's law long before being exposed to *The Structure of Blackstone's Commentaries*,⁵³ or the works of famous dead Europeans. If not ourselves, then certainly our parents and grandparents lived the contradictions of liberalism and liberal rights theory with a degree of intensity that few nonminority intellectuals can ever hope, or rather not hope, to experience. While many of the minority students that we teach today appear not to feel those contradictions as intensely as our elders or perhaps even ourselves, nonetheless, the tangible impact of the denial of rights to our various peoples still is felt even by this generation born to relative, though by no means, complete privilege. In short, peoples of color, for the immediate present at least, do not require critical legal theory or CLS in order to be critical of the United States legal system. We are all aware that there is much work yet to be done.

Given the immense nature of our task in criticizing and working to transform society, I do believe that critical legal theory and yes, even CLS, can be of assistance in teaching us how to be critical in a more effective, penetrating fashion. The decoding of European-derived colonial and cultural imperialist discourse requires a methodology capable of unearthing what lies hidden away beneath the apocryphal legal texts, fables, and myths which conceal the techniques and multiple forms of subjugation practiced upon peoples of color in the United States. Critical legal theory and CLS offer such a methodology.

53. Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 Buffalo L. Rev. 205 (1979).

I feel it is important to recognize at the outset that today, CLS is essentially a legal academic movement employing what are finally becoming familiar academic tools in the law school: critical social theory, deconstruction of texts or "trashing," critical histories, and other methods derived from the traditions of European critical theory. These diverse tools have all been employed within the CLS movement by critical legal scholars engaged in the practice of what David Trubek, a founder of CLS,⁵⁴ has called "scholarship as politics."⁵⁵ The tools employed in this practice of scholarship as politics are all designed to chip away at the perceived "truths" of the white man's dominant legal world view to reveal its underlying contradictions, historical contingencies, and Eurocentric biases: enterprises in which minority law professors share common concerns and aspirations.

A central tenet held by critical legal scholars is the belief that by employing the tools of critical method to legal thought and doctrine, they can transform legal consciousness, that is, the way we think about and practice law.⁵⁶ The idealized goal of CLS scholarship as politics is this transformation of legal consciousness, and through this transformation, to contribute to the larger goal of social transformation.

It is important for minority legal scholars to always keep in mind the point at which they must part ways with their CLS brothers and sisters on the path of this transformative project. CLS scholarship as politics would seek the transformation of legal consciousness leading to the abandonment of various so-called reifications such as "rights." Minority legal scholars, because of the unique positions of trust they hold from their people, must pursue a different, nonmillennialist path. Our immediate goal must be to transform the conditions oppressing our respective peoples. These oppressive conditions demonstrate that the principles grounding the dominant society's legal and political discourse are corrupted

54. See Schlegel, *supra* note 24, at 392-96.

55. David M. Trubek, *Taking Rights Lightly?: Radical Voices in American Legal Theory*, Lecture on Law and Social Theory sponsored by the New School for Social Research and the Cardozo Law School, Nov. 19, 1984 (on file with Law & Inequality). See also Trubek, *supra* note 19, in which Trubek makes essentially the identical claim: "If society is in some sense constituted by the world views that give meaning to social interaction, then to change consciousness is to change society itself. This is the central tenet of the CLS creed, the grounding for its belief that *scholarship is politics*." *Id.* at 592 (emphasis added). While Trubek would most likely disagree with many of the points which I make in this article on the *perils* of CLS for peoples of color, many of my own views on the *promise* of CLS for peoples of color have been positively influenced through several talks with him, as well as his comments on an earlier draft of this paper.

56. See, e.g., Trubek, *supra* note 19, at 591-93.

and remain unrealized. These conditions in fact are the tangible proof of the failure of rights theory. Because many of these conditions are sustained by assumptions about the way the legal, political, and social world is, the concrete political program of minority people relies on reifications such as "rights" to speak directly to the conscience of the dominant society. Rights discourse enables us to articulate the tangible injustices perpetrated upon peoples of color by the existence of these conditions. Through rights discourse we challenge the assumptions which prevent the translation into practice of unrealized principles revered by the dominant order, such as "rights."

Recall the divergent reading of the parable of the Grandfather and the Elevator. Like the Grandfather, we too find ourselves in a relative tactical position of weakness. We too must sometimes dissemble in an alien discourse of power and knowledge. The treacherous and unfavorable terrain upon which we wage our guerrilla war for our "rights" counsels a strategy whereby we seek to be underestimated. Peoples of color must "go under" and behind the lines of majority society's discursive practices to liberate our previously colonized and subjugated knowledges. These knowledges contain our expressions of a will to insurrection which continuously challenges the authority of the dominant order. This will, therefore, shall always press its challenge until it either expires, or the penetrative task of our critique secures defensible positions from which to freely articulate our own visions. For peoples of color, rights rhetoric is a primitive weapon, but one we cannot afford to ignore or denigrate, though in our hearts we may question its ultimate utility or relevance once we secure our positions.

Thus, the minority scholar's task is that of the rhetorician, understood in its classical sense and uncorrupted by the negative reputation brought to the exercise of rhetorical skill by the Greek Sophists.⁵⁷ From Plato and Aristotle onward, the task of the rhetorician, properly understood, has been recognized to be the "mastery of the faculty of speaking in such an effectively persuasive way that the arguments brought forward are always appropriate to the specific receptivity of the souls to which they are directed."⁵⁸

Thus, we differ with our brothers and sisters in CLS in that we cannot afford the luxury of a wholly negative critique which distances and alienates an already historically proven hostile audience. We are all responsible for our discourse, its uses and abuses.

57. See Gadamer, *supra* note 1, at 21-24.

58. *Id.* at 22.

Our scholarship as politics must be engaged at a practical, immediate level. We must be fancy rhetoricians who adopt neither a serious nor light theoretical stance towards rights. Rather, we must adopt a warlike posture seeking to take rights aggressively. The ideals and principles represented by rights must be deployed as weapons, traps, and snares in the absence of some other containing discursive practice which might constrain the majority from annihilating the minority. We have no choice but to take rights aggressively while we buy the time needed to perfect new weapons out of the materials at hand provided by our insurrectionist discursive traditions.

Thus we return to the parable of the Grandfather and the Elevator to explore the promise of critical legal theory for peoples of color. The methodologies of critical legal theory provide numerous tools to the minority scholar who desires to be an aggressive rhetorician engaged in discursive guerrilla warfare over the terrain of rights. CLS methodologies are well tailored to the creative destruction of legal doctrines and forms of legal discourse which sustain the conditions oppressing minority peoples, and which stand in the way of their realizing the tangible benefits promised under rights discourse. (And here it should be pointed out that rights discourse and legal discourse have always been regarded as capable of divergence within the discursive traditions of peoples of color.)⁵⁹

For example, one principal methodological tool frequently employed by CLS scholars in their acts of creative destruction is the critical legal history.⁶⁰ Critical legal histories can be used to aid minority scholars in one of their most important scholarly tasks—the decoding of the apocrypha of European-derived colonial and cultural imperialist discourse.

Indian people have a long tradition of never pretending to speak for others, so I will refer to my own scholarly concerns for examples of the relevance of CLS to the legal scholarship of minority law professors. Much of my own scholarly work has been devoted to the history of federal Indian law. Much of that history revolves around the judicial articulation of legal rules and principles derived from the Doctrine of Discovery. The Discovery Doctrine was best articulated by Chief Justice John Marshall in a case many law students probably encountered in their first year Property class, *Johnson v. McIntosh*.⁶¹ The Doctrine essentially stands

59. See *supra* text accompanying notes 43-45.

60. See generally Robert Gordon, *Critical Legal Histories*, 36 Stan. L. Rev. 57 (1984).

61. 21 U.S. (8 Wheat.) 503 (1823).

for the proposition that upon discovery by a European sovereign, legal title to aboriginally held territory in the New World vested in the discovering European nation. The indigenous tribes inhabiting the territory henceforth were to be treated as dependent, diminished sovereigns whose rights and status were to be unilaterally determined within the domestic law of the invading European colonial government.⁶²

The Discovery Doctrine has been extended and interpreted by United States courts to vest an unquestioned plenary power in Congress acting in a guardian-ward relationship with respect to American Indian Nations.⁶³ Principles and rules derived from the Doctrine and its notions of congressional plenary power in Indian affairs have legitimated numerous injustices and violations of "rights": uncompensated congressional abrogations of Indian treaty rights, takings of Indian lands and resources, forced sterilization of Indian women, violent suppression of traditional religions and governing structures, and all the other usual forms of genocide and ethnocide perpetrated upon Indian people by Anglo "civilization."⁶⁴

In short, Indian people regard the Doctrine as the "separate but equal"⁶⁵ and *Korematsu*⁶⁶ of the white man's law respecting their status and rights. Worse, however, is the fact that United States courts continue to this day to rely on the Doctrine and its derivative forms of legal discourse to determine Indian status and rights.⁶⁷

My own work has focused upon the historical foundations of the Doctrine and its Eurocentric, racist origins, to reveal its anachronistic and biased presuppositions. I have sought to demonstrate the Doctrine's origins in European medieval and Renaissance legal discourse respecting normatively divergent non-Christian peoples.⁶⁸ A by-product of the medieval Christian church and Europe's crusading era, this discourse treated all non-European alien cultures as subject to Eurocentrically-conceived normative value

62. *Id.* at 504. See generally James Henderson, *Unraveling the Riddle of Aboriginal Title*, 5 Am. Indian L. Rev. 75 (1977).

63. See generally Robert Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing the White Man's Indian Jurisprudence*, 1986 Wis. L. Rev. 219 (1986).

64. *Id.* at 264-65.

65. *Plessy v. Ferguson*, 163 U.S. 537 (1896). But see *Brown v. Board of Education*, 347 U.S. 438 (1954) (overruling *Plessy*'s "separate but equal" doctrine).

66. *Korematsu v. United States*, 323 U.S. 214 (1944) (holding that the United States could lawfully intern Japanese Americans in concentration camps during World War II).

67. See Williams, *supra* note 63, at 265-91.

68. See generally Williams, *supra* note 6, at 1.

structures, such as Christian natural law, or the Law of Nations. Breach of divergence from these norms legitimated conquest by European nations, who then assumed a duty of "civilization" and conversion of these vanquished peoples which they "discovered." Most importantly, "discovery" also vested in the European "discoverer" underlying title to the lands occupied by these peoples.⁶⁹

In addition to this critical historiography of the Doctrine of Discovery, I have also sought to demonstrate the manner in which the biased and archaic structuring premises supporting the Doctrine infect all contemporary legal discourse regarding Indian tribes. The Doctrine and its anachronistic premises sustain a contemporary legal and political regime threatening Indian people with cultural liquidation.⁷⁰ This type of critical history is far different from the type of functionalist-evolutionary legal history comprising the dominant tradition of United States legal historiography.⁷¹ In broad outline form, the functionalist-evolutionary tradition advances the notion of a natural and proper progressive social evolutionary path towards the type of liberal-individualistic societies seen in the technocracies of the West, and that the natural and proper function of a legal system is to facilitate such an evolution.⁷²

The functionalist-evolutionary tradition has infected the historiography of federal Indian law to a remarkable and dangerously narcotizing degree. In this historiography, the Doctrine of Discovery has first been relativized as an aberration of an outdated colonial-imperialist mentality. After this exercise in apologetics, it is usually demonstrated that through the purifying emetic of United States Supreme Court jurisprudence, the Doctrine and its derivative rules and principles have been adapted to changing needs. In the process, its more oppressive and anachronistic aspects have been allegedly humanized and liberalized.⁷³

A critical legal history of the Doctrine is engaged in a far more radical practice of scholarly politics, a practice which recognizes at the outset the unmistakable political legitimating character of the functionalist-evolutionary tradition of legal historiography. Critical legal history challenges the basic premise that the Doctrine and the legal discourse it has generated represent an ob-

69. *Id.*

70. See generally Williams, *supra* note 63, at 219.

71. For a descriptive analysis of functionalist-evolutionary legal history, see Gordon, *supra* note 60, at 59-67.

72. *Id.*

73. See, e.g., Russel Barsh & James Henderson, *The Road: Indian Tribes and Political Liberty* (1980) (provides an excellent overview of this historiography).

jective response to objective historical processes. Rather, the Doctrine of Discovery and the body of rules and principles derived from it in federal Indian law represent political products that, to borrow the words of one crit historian, "arise from the struggle of conflicting social groups that possess very disparate resources of wealth, power, status, knowledge, access to armed force and organizational capability."⁷⁴

A critical legal history of the Doctrine denies the Doctrine's claim to legal and social rationality as a basis for determining Indian rights and status. The critical historical scholar's task is thus to demonstrate instances where the Doctrine has cloaked bare power in the fabric of a discourse of rights. A critical legal historiography of the Doctrine would effectively expose it as a product of highly contingent historical and cultural circumstances that need no longer constrain our thought on the possibilities of tribalism's role in modern United States society. This deconstructive project has as its ultimate goal, therefore, the transformation of federal Indian law towards a basis which adequately secures and protects in a tangible, real sense tribal status and rights. Such a transformation would protect tribal sovereignty, respect treaties, and guarantee and provide just compensation for all past breaches. This transformative goal can never be achieved, however, until the present conceptual basis of federal Indian law, the Doctrine of Discovery, is destroyed.

I am certain that other non-Anglo legal scholars desire to pursue similar transformative projects of benefit to their peoples whom they serve. The contemplated benefits from such projects transcend racial or ethnic boundaries, uniting us in a common struggle against a dominant vision of law which we all experience as alien and alienating with respect to our visions of self and community. We are all maroons; our peoples—Black, Brown, Red—relegated to the Dismal Swamps on the periphery of late capitalism.⁷⁵ We share our fugitive existence in the unreclaimable waste-

74. Gordon, *supra* note 60, at 101.

75. Virtually ignored by the dominant historiographical tradition, "maroon" communities of fugitive slaves, dispossessed American Indians, runaway indentured servants, white debtors, and escapees from Spanish galleons resisted and frequently terrorized European colonizers in the Carribean and North, South, and Central America. The histories of countries such as Jamaica, Nicaragua, Panama, and Haiti were substantially shaped by the resistance of these independent militant maroon societies.

In the United States, the most famous haven for maroon communities was the Great Dismal Swamp. This vast unreclaimed marsh region extended north and south a few miles inland from the Atlantic on both sides of the Virginia-North Carolina border, covering an area roughly the size of Rhode Island.

The maroon communities of the Dismal Swamp were originally formed by

lands abandoned to wild nature by the core society. Unable to participate fully in the freedoms, the "rights," enjoyed at the core, we are recognized as the detritus of a decaying vision; a vision which sought our dispossession, our bondage, or our peonage.

As minority individuals placed in unique positions of status and privilege, and paradoxically, on the margins of this Anglo-dominated society (even in our own law schools, we are maroons), I should think we are uniquely qualified to practice a form of politics requiring an insider's knowledge applied from an outsider's perspective. In fact, I think that as people of color, we are far more qualified to engage in a critique of the white man's legal vision than many of the Anglos from elite law schools who presently dominate CLS with what I regard as a dangerously irrelevant form of legal mandarinism. That does not mean we should not welcome CLSers as our allies in struggle. But the time has come to be blunt. If CLS is to maintain its relevancy for peoples of color, then, as a minimal qualification, its practitioners must be able to write in comprehensible prose English and deal with important and complex issues in a serious and purposive mature fashion. Like my liberal and radical nonminority colleagues, I strongly support Affirmative Action, but I am also concerned about standards for participation in the movements of our respective peoples.

remnants of the Algonquian, Chesapeake, and Tuscarora tribal groups which had been exterminated and enslaved by the English in the early and mid-seventeenth century. Fugitive slaves, persecuted Irish Catholics, and other refugees from colonial British society subsequently followed into the safety of the virtually impenetrable swamp, and were freely accepted into the Indian maroons. F. Roy Johnson, *Tales from Old Carolina* 153-60 (1965).

Beginning in the early eighteenth century, the maroons continually terrorized Virginia and North Carolina plantation slaveholders. Maroon bands conducted frequent and bloody guerrilla raids, liberating slaves, and plundering crops and livestock. In 1714, then-Governor Spotswood of Virginia warned the colonists: "Loose and disorderly people daily flock to this no-man's land." Johnson, *supra*, at 41.

There is evidence of a well-articulated and vigorous insurrectionist discourse, and a complex and relatively comprehensive communications network which disseminated this discourse throughout the maroon communities in the Swamp. I would suggest that there is much work which still needs to be done in unearthing the discursive practices of this neglected region of the history of peoples of color. My own knowledge of the history of the maroons and of the Great Dismal Swamp was substantially enhanced by William M. Calhoun, Jr., a Black student at the University of Wisconsin Law School who has written a paper entitled *The Rebirth of Life, Liberty and the Pursuit of Happiness: Swamp Resistance to Slavery and the Fulfillment of the Ideas of the Revolution* (on file with Law & Inequality). More accessible materials include Herbert Aptheker, *American Negro Slave Revolts* (1963); Hubert J. Davis, *The Great Dismal Swamp* (1962); F. Roy Johnson, *Tales from Old Carolina* (1965); Richard Price, *Maroon Societies: Rebel Slave Communities in the Americas* (1973); R.H. Taylor, *Slave Conspiracies in North Carolina*, 5 N. Car. Hist. Rev. 20 (1928).